

C O P Y *in opinion*

NEW HAMPSHIRE LAW LIBRARY

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SEP 03 1998

March 13

CONCORD, N.H.

Arthur M. Menard, Esq., Regional Attorney,
Federal Security Agency
120 Boylston Street
Boston, Massachusetts

Dear Arthur:

You have inquired whether New Hampshire has a void marriage statute whereunder a child born of a void marriage may be considered legitimate and particularly whether section 20 of chapter 339 of the Revised Laws may be construed as a void marriage statute.

It is my opinion that section 20 of chapter 339 of the Revised Laws does not legitimize children born of a void marriage.

In replying to your particular question, (1) this statute does not assure the legitimacy of children born of every marriage entered into in good faith by the parties even though such marriage is void and has never been judicially annulled; (2) nor does the statute apply to children born of a void marriage entered into in good faith by the parties if the marriage has been judicially annulled. The statute applies only to voidable marriages.

Section 1 of chapter 339 of the Revised Laws declares to be absolutely void without any legal process, all marriages prohibited by law on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this State. At common law marriages within the degrees of consanguinity and affinity were voidable rather than void, and children of such a marriage, in the absence of a decree of nullity, were treated as legitimate. Section 1 of chapter 339 abrogates the common law rule by declaring such marriages to be void. Hilliard v. Baldwin, 76 N.H. 142 at page 144; Hayes v. Rollins, 68 N.H. 191 at page 192; Bickford v. Bickford, 74 N.H. 448 at pages 452-453.

With regard to bigamous or polygamous marriages, section 1 of chapter 339 is declaratory of the common law rule that such marriages are void. Hilliard v. Baldwin, supra, at page 144; Heath v. Heath, 85 N.H. 419 at page 431. The children born of a void marriage are illegitimate. (Hilliard v. Baldwin, supra, at page 144.

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It is my conclusion that section 20 of chapter 339 legitimizes children born of marriages other than those declared to be void by section 1 of that chapter.

It may be relevant to your problem to point out that inheritance rights of bastards are protected in some measure by section 5 of chapter 360 of the Revised Laws providing that when the mother of a bastard dies, her real estate shall descend and her personal estate be distributed in equal shares to her legitimate and illegitimate children and their issue. Also, your attention is invited to section 42 of chapter 338 of the Revised Laws providing that "where the parents of children born before marriage afterwards intermarry, and recognize such children as their own, such children shall be legitimate and shall inherit equally with their other children under the statute of distribution". This statute merely permits marriages not otherwise prohibited by law in order to legitimize children. It does not, however, make the father and mother of a child legally capable of entering into the marriage relation where such marriage relation would be prohibited by section 1 of chapter 339 of the Revised Laws. Hilliard v. Baldwin, supra, at page 145.

It was a pleasure to be of assistance with regard to this matter. Please don't hesitate at any time to forward inquiries to this office.

Kindest personal regards,

Sincerely yours,

John M. Passikas
Assistant Attorney General

JNN:HP